No. 232.

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for Collector

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In the Supreme Court of the United States.

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WILLIAM J. CRUICKSHANK ET AL., complainants,
v.
GEORGE R. BIDWELL, COLLECTOR OF customs for the port of New York.
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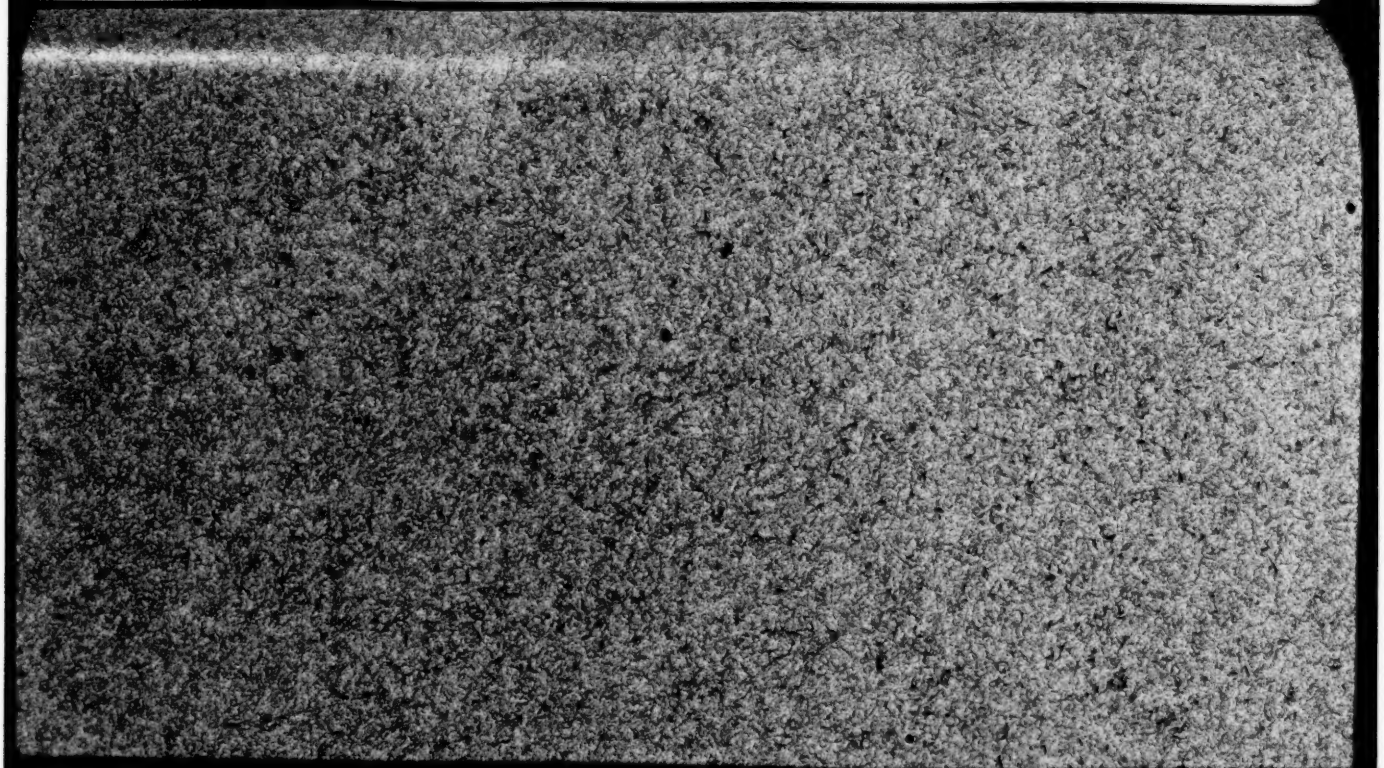
BRIEF FOR APPELLEE.



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This is an appeal from a decree of the circuit court (Lacombe, J.) dismissing a bill in equity upon demurrer. The bill draws in question the constitutionality of a law of the United States, so that the appeal was taken direct to this court. The opinion below is reported at 86 Fed. Rep., 7. The constitutionality of the act had been previously sustained by DeHaven, J., in the northern district of California, in *Sang Lung* v. *Jackson* (86 Fed. Rep., 502). The construction of the act has also been

discussed by Lacombe, J., in *Buttfield* v. *Bidwell* (94 Fed. Rep., 126), and by the circuit court of appeals on appeal in the same case in a *per curiam* opinion (Mr. Justice Peckham and Wallace and Shipman, JJ.) reported at 96 Fed. Rep., 328.

STATEMENT OF FACTS.

The demurrer admits the following to be the facts in the case:

Complainants are importers of teas from Japan. They imported the teas in question in November, 1897—in all, 76,869 pounds, the five invoices being worth altogether something over $4,000 (pp. 2, 3).

These teas are held by the defendant, claiming to act in his official capacity as collector of customs for the port of New York, and under authority of the act of Congress approved March 2, 1897, entitled "An act to prevent the importation of impure and unwholesome tea." Under this act certain standard samples of teas have been selected by the Secretary of the Treasury. Samples taken from complainants' invoices were compared with the standards by the examiner appointed under the act of 1897, and were found "inferior in some or all of the respects designated in said act of Congress, either as to purity, quality, or fitness for consumption" (pp. 1, 2). Defendant claims the right to retain these teas for six months, and then cause them to be destroyed; and demands security from the complainants that they will forthwith reexport the teas, and will submit the invoices and various papers relating to the teas to be

marked by the defendant as "teas condemned under the laws of the United States."

It is not denied by the bill that the teas are, as claimed by the collector, inferior to the standard. In fact, this is conceded by the complainants' failure to appeal from the examiner's decision.

The bill alleges "irreparable damage," but shows that the damage is measurable in money, it appearing that the teas are of known value. It appears by the bill that the teas will be a total loss, whether they are left to the collector to be destroyed or withdrawn for reexport.

The bill further alleges that complainants intend to import other invoices of teas, and that defendant threatens and intends to seize them, etc., and that complainants' "right to import and deal in teas is thereby destroyed and taken away" (p. 4); but it fails to allege that complainants intend to import impure or unwholesome teas, or to show how their right to import and deal in teas is taken away if they import only pure and wholesome articles of decent quality.

No foundation thus appears for the general allegation that "complainants are without any adequate remedy at law," and they do not claim that they would be involved in any multiplicity of suits. There is only one collector of the port of New York to which port complainants' business appears to be confined (p. 1).

The bill is based solely on the theory that the act of 1897 is unconstitutional. It prays for an injunction "restraining the said defendant from continuing to hold possession of the said teas, as hereinbefore set forth, and from refusing to permit your orators to take possession of

the same and withdraw the same from the said warehouses, and from marking or stamping the invoices and papers relating to the importation thereof with the words 'Condemned under the laws of the United States,' or any words to that effect, and from destroying the said teas, and from exercising any alleged right, possession, or authority relating to or concerning the said teas, purporting to be conferred or created or authorized by the said act of Congress entitled 'An act to prevent the importation of impure and unwholesome tea,'" and for general relief (pp. 4–5).

THE ACT OF 1897.

The title of this act, as above stated, is "An act to prevent the importation of impure and unwholesome tea."

Section 1 makes it unlawful—

> To import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption, to the standards provided in section three of this act, and the importation of all such merchandise is hereby prohibited.

Section 2 provides for the appointment, by the Secretary of the Treasury, immediately after the passage of the act, and on or before February 15 of each subsequent year, of a board of tea experts, consisting of seven members, "who shall prepare and submit to him standard samples of tea."

Section 3 provides that "The Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported

into the United States." Samples of these standards are to be deposited in various custom-houses, and supplied to importers and dealers at cost. The section ends as follows:

> All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

Section 4 provides that upon entry of teas at the custom-house, the importer or consignee shall give a bond to the collector that the merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality, and fitness for consumption. At the port of New York there is a special officer assigned to this duty and known as the examiner of teas.

Section 5 provides that (in the absence of any protest against the examiner's decision) if the tea be found equal to standard, "a permit shall at once be granted to the importer or consignee, declaring the tea free from the control of the customs authorities." If found below standard, it shall not be released.

Section 6 provides that "In case the collector, importer, or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States General Appraisers to be designated by the Secretary of the Treasury." If found equal to standard by this board, a permit shall be issued. If the contrary, it must be exported out of the limits of the United States within six months, or the collector at the expiration of that time shall cause the same to be destroyed.

Section 10 provides that "The Secretary of the Treasury shall have the power to enforce the provisions of this act by appropriate regulations."

The other sections contain certain administrative regulations, provide against the reimportation of rejected teas, and repeal (as to future importations) the prior act of March 2, 1883, *in pari materia*.

ARGUMENT.

I.

Assuming the act of 1897 to be unconstitutional, nevertheless complainants have mistaken their remedy.

Complainants seem to suppose that anybody who suffers pecuniary loss by reason of the execution by Federal officers of a Federal statute claimed by him to be unconstitutional, may have the constitutionality of the statute promptly tested by suit for an injunction against the enforcement of the law. If this be true, all the constitutional questions arising, or which anybody may think arise, under the laws of the United States, may indeed be promptly tested; but it is very strange that so prompt and efficient a remedy has been overlooked by the jurists of the past. It would have been most convenient in 1828 at the time of the great discussion over the constitutionality of the tariff, and in 1868 during the contest over the tenure-of-office act, as well as on other occasions which will occur to the minds of the court.

This bill is based on certain authorities sustaining injunctions against State officers, restraining them from the enforcement of State laws which are repugnant to the

Federal Constitution. The jurisdiction of the Federal courts is exercised very much more freely against State officers than against officers of the coordinate branches of the United States Government. Yet even a bill alleging unconstitutionality of a State statute would not be sustained in a case like this.

Assuming for the present the unconstitutionality of this act of 1897, we shall show, first, that the constitutionality of a Federal statute will not be considered upon an application for an injunction against its enforcement; second, that the complainants have no vested rights sufficient to support an application for an injunction against a Federal executive officer; third, that the existence of an adequate remedy at law, as in this case, would defeat such an application, even were it against a State officer concerning an unconstitutional State law; and finally, that these complainants are not in a position to invoke this discretionary equitable process.

(1) *The constitutionality of a Federal statute will not be considered upon an application for an injunction against its enforcement.*

Although an unconstitutional law is no law, yet the courts show sufficient respect to Congress not to interfere in this summary manner. This was one of the grounds of denying relief in *State of Mississippi* v. *Johnson* (4 Wall., 475, 500), where Chief Justice Chase said:

> Had it been supposed at the bar that this court would in any case interpose by injunction to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

Since the leading cases of *Kendall* v. *United States* (5 Cranch, C. C., 163, 12 Pet., 524) and *Decatur* v. *Paulding* (14 Pet., 497), the practice of the Federal courts as to original writs of mandamus and injunctions against Federal executive officers has been radically different from their practice in relation to State officers. The respect entertained, or at least exhibited, by the judiciary toward the coordinate executive branch of the Government has been such that process of this kind, enforceable only by contempt proceedings, has never issued simply because of a difference of opinion as to the true construction of the Federal statute. Upon such an application the statute is regarded much as if it came up under the modern code practice upon an application for judgment upon a demurrer as frivolous. Process issues only when the question is too plain for argument. This is the effect of the decision in the Decatur case. (14 Pet., 497, 515, 521, and see dissenting opinions at pp. 577, 606.) The rule has been since applied in a series of familiar cases, of which we may cite as examples among recent mandamus cases *United States ex rel. Dunlap* v. *Black* (128 U. S., 40, 48); *United States* v. *Lynch* (137 U. S., 280, 286); *Seymour* v. *South Carolina* (2 D. C. App., 240, and cases cited); and *Carlisle* v. *Waters* (7 D. C. App., 517, 522–523). Among injunction cases we may cite *Gaines* v. *Thompson* (7 Wall., 347, 352–353) and *Litchfield* v. *Register and Receiver* (9 Wall., 575, 577–578). In fact, in only three cases have original writs of mandamus against executive officers ever been sustained by this court (see *Seymour* v. *South Carolina*, *supra*), and the only such injunctions which have ever received this

court's approval were those in *United States* v. *Nourse* (9 Pet., 8), where the remedy was based upon a special statute, and in *Noble* v. *Union River Logging R. R. Co.* (147 U. S., 165), (where it may be remarked that the Government raised no point as to the form of remedy).

The doctrine of the State of Mississippi case, above cited, would seem to be that when Congress gives an interpretation to the United States Constitution by legislation, and when the Executive confirms this interpretation by enforcing the legislation, then the courts can not say that the question is too plain for argument or that the position taken by two out of the three branches of the United States Government is frivolous.

Only one other attempt, so far as we are aware, has been made since the State of Mississippi case to test the constitutionality of a Federal statute by an injunction suit against the officer charged with the duty of executing it. That instance was the suit of *Moore* v. *Miller* (5 D. C. App., 413), attacking the validity of the income tax of 1894. The bill having been dismissed by the lower court, the case was argued in this court, together with the two income tax cases reported in 157 and 158 U. S. Its only distinction from those cases was in the form of remedy. No decision was rendered by this court at the time of deciding the two other cases, and it still remained undecided when, many months later, the appeal was dismissed by Mr. Moore at his own costs. (163 U. S., 696.)

The divergence between the Federal jurisdiction in these matters and that of the States and of Great Britain is partly historical in origin. The experience of the earlier

years of our Government had taught both the Executive and the judiciary that their relations to each other must be treated with great delicacy in order to avoid unfortunate conflicts of jurisdiction. This danger had been pointed out by the Marbury case, the Aaron Burr case, and others. The whole matter was finally brought up in a most striking manner in the case of Postmaster-General Kendall, above quoted; and both that officer and Attorney-General Butler filed solemn protests against the exercise of any jurisdiction which would involve possible contempt proceedings against officers of a coordinate branch of the Government. (5 Cranch, C. C., 192–199, 221–225.) The case was most elaborately argued in 1840 before a supreme bench of whom five had been prominent in Congress, three had been Cabinet officers, and four had been upon the bench in their respective States. The decision reached by a majority of these learned justices has as yet remained unshaken in this court.

(2) *The complainants have no vested rights sufficient to support an application for an injunction against a Federal executive officer.*

As above pointed out, the only case in which (apart from special statute) an injunction like the present has been sustained in this court is that of *Noble* v. *Union River Logging R. R. Co.* (147 U. S., 165). In that case interference of some sort was necessary in order to protect a vested legal right of property—property acquired before any suggestion of an attempt on the part of the Executive to take it away. The complainant in that case

stood more as these complainants would have stood had their teas been imported prior to the act of 1897, and entered at the custom-house on the day after the regulations under that statute took effect.

But these complainants have no vested right to protect, unless everybody has a vested right to import merchandise of all kinds, pure or impure, wholesome or unwholesome. The act was approved March 2, 1897. None of the teas in question arrived prior to November of that year. It is not claimed that they were purchased before the act, and the regulations and standards adopted thereunder, had been publicly promulgated and had become well known to these complainants. It is the fair inference from their bill of complaint that when they first became aware of the statute regulations and standards their money was still in their pockets. They did not need to invest it in impure and unwholesome teas. So far as appears by the bill (and this is in all probability the fact), they so invested with their eyes open, taking the chances of exclusion on account of the very great profit which they would make if they could get the teas into the country, either by negligence in the custom-house or by this suit.

But there is no vested right to import goods into this country. Congress has the power to exclude any or all articles from foreign commerce (II, *infra*). This right it may exercise by direct prohibition if it pleases, although the more common method is by prohibitory impost duties. Notwithstanding the general right of a citizen to pursue any honest vocation, there are many exceptions (*United States* v. *Joint Traffic Association*, 171 U. S., 505, 572,

573); and this Congressional power to curtail or prohibit the importation of goods from abroad is one of the longest recognized of these exceptions. As remarked by Judge Lacombe in this case, "No citizen of the United States has a vested right to import teas, if Congress, under its power to regulate commerce, prohibits their importation." (Record, p. 7; 86 Fed. Rep., 7; see also *Sang Lung* v. *Jackson*, 85 Fed. Rep., 502, 505, 507, De Haven, J.)

(3) *Even were this a suit against a State officer concerning an unconstitutional State statute, the bill would be dismissed because there is an adequate remedy at law.*

Section 723 of the Revised Statutes, limiting the equity jurisdiction of the federal courts, is but declaratory of the general principles of chancery courts. (Cases cited in 1 Gould and Tucker's Notes, 201; 2 id., 84, 85.)

It is to be borne in mind that the destruction of these teas would be entirely compensable in damages. It appears that they have a known value. Nor is it suggested that the destruction of these five lots would have any indirect effect upon the complainants' business.

Nor is it alleged that the defendant is pecuniarily irresponsible, so that a judgment for damages against him would be uncollectible. On the contrary, such judgment would be collectible out of the funds in the United States Treasury under section 989 of the Revised Statutes.

Nor does it appear—it is not even claimed—that there would be any multiplicity of suits in case complainants were left to their remedy at law. It is alleged that complainants intend to import from time to time other in-

voices of tea; but it is not alleged that they intend to import impure or unwholesome teas. It is alleged that the collector "threatens and intends to seize and hold such teas," etc.—that is, the teas which complainants intend to import; but this would only lead to the result that in addition to the cause of action which they may now have against him they will have one or more such causes of action in the future. Such threatened future action could not have any indirect effect upon complainants' business in the future not compensable in damages, for complainants will be unmolested in the tea business if they confine themselves to a pure and wholesome article of decent quality.

If this statute be unconstitutional, its provisions and the regulations of the Secretary of the Treasury thereunder would be no defense to an action for damages for tort. (*Poindexter* v. *Greenhow*, 114 U. S., 270; *Scott* v. *Donald*, *infra*.)

Nor would the fact that the defendant was a public officer in any way affect the right of action of the injured party (*Little* v. *Barreme*, 2 Cranch., 170; *Gelston* v. *Hoyt*, 3 Wheat., 246; *Bates* v. *Clark*, 95 U. S., 204; *Stanley* v. *Schwalby*, 147 U. S., 508, 518).

If this statute be unconstitutional, the acts of the collector in withholding and destroying the property are as tortious as those of the South Carolina State constable under the dispensary act, discussed in *Scott* v. *Donald* (165 U. S., 58).

There is no general jurisdiction in equity to enjoin trespasses or conversions of personal property committed by Government officials any more than there is general

jurisdiction to restrain them when committed by private individuals. Examination of the cases where injunctions have been granted against the enforcement of unconstitutional State tax laws show that in all cases the bills were based upon good equitable grounds, such as the prevention of clouds upon the title to real property, or real multiplicity of actions.

An example of the cases where an equitable remedy is proper is given by *Union Pacific Railway Co.* v. *Cheyenne* (113 U. S., 516, 526, 527), where the injunction was based on the fact that enforcement of the tax would "involve the plaintiff in a multiplicity of suits as to the title of lots laid out and being sold, would prevent their sale, and would cloud the title to all its real estate."

The injunctions in *Osborn* v. *United States Bank, Cummings* v. *National Bank, Virginia Coupon Cases*, etc., are explained by Chief Justice Fuller in *Shelton* v. *Platt* (139 U. S., 591, 599), which was a suit brought by Thomas C. Platt as president of the United States Express Company on behalf of himself and his associates, who were too numerous to be joined as parties, to restrain the collection of a license tax by the State of Tennessee, alleged by him to be unconstitutional. He averred that a distress warrant had issued against the property of his company for the license taxes of 1887 and 1888, and that another distress warrant was threatened for the year 1889. The bill averred that if the property was seized the company would be subjected to loss, and that it was without adequate remedy at law. It was admitted that the company could pay the license tax under protest and

sue to recover it back. The decision is accurately stated in the syllabus as follows:

> While an unconstitutional tax may confer no right, impose no duty, and support no obligation, the trespass resulting from proceedings to collect such void tax can not be restrained by injunction where irreparable injury or other ground for equitable interposition is not shown to exist.

The question came up again in *Allen* v. *Pullman's Palace Car Company* (139 U. S., 658) where, as correctly stated by the syllabus, the court, speaking again by Mr. Chief Justice Fuller, held as follows:

> Purely injunction bills can not be maintained to restrain the collection of taxes upon the sole ground of their unconstitutionality. * * * When in a suit in equity this court finds, on examining the proofs, nothing which makes a proper case for equity, it is its duty to recognize the fact and give it effect, though not raised by the pleadings nor suggested by counsel.

The principle is again reaffirmed in *Pacific Express Company* v. *Seibert* (142 U. S., 339, 348). In the Supreme Court in that case Mr. Justice Lamar said:

> But when the illegality of the tax, or the invalidity or unconstitutionality of the legislative act under which it is imposed is established, it becomes necessary to go further and make out a case that can be brought under some recognized head of equity jurisdiction—such as that the collection of the tax sought to be restrained *may entail a multiplicity of suits, or cause some other irreparable injury; as, for instance, the ruin of complainant's business; or, where the property is real estate, throw a cloud upon the title of the complainant.*

A good example of the kind of cases in which equitable jurisdiction is based upon inadequacy of legal remedy for injury to personal property is *Watson* v. *Sutherland* (5 Wall., 74), where the court enjoined the execution of writs of *fi. fa.*, which would have destroyed the good will of a going concern and blasted the credit of its proprietors.

A good example of the kind of cases in which equitable jurisdiction can be based upon multiplicity of suits is *Smyth* v. *Ames*, 169 U. S., at pages 517, 518, where, as Mr. Justice Harlan pointed out, "the transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute."

The present bill is avowedly based on the case of *Scott* v. *Donald* (165 U. S., 107), which arose under the South Carolina dispensary laws. It was accompanied to this court by a common-law judgment for damages in tort upon similar facts (165 U. S., 58). The general objections to injunctive relief seem not to have been pressed before this court, the objection made being simply "that it is in effect proceeding against the State itself, and that it interferes with the official discretion vested in the officers" (p. 112). The circuit judge certified that the legal right of complainant had already been adjudged in an action at law between the same parties (Record, p. 40). The agreed statement of facts showed eleven seizures by various constables, of whom all, except in one case, were "insolvent and financially irresponsible" (id., p. 58), and that three judgments had already been given against the

defendants for similar seizures (id., p. 56). The pleader's reliance on that case perhaps explains the curious omissions in this bill of complaint. All importations of liquor were forbidden by the South Carolina law. Hence it was sufficient to allege in that case that complainant intended to continue his importing business. All importations of tea are not forbidden by this law; and here, too, the pleader was unable to allege multiplicity of actions, because his clients' business was confined to the single collection district of New York.

(4) *These complainants are not in a position to invoke this discretionary equitable process.*

An injunction is granted only in the equitable discretion of the court. (*Truly* v. *Wanzer*, 5 How., at pp. 142, 143; *O'Reilly* v. *N. Y. Elevated R. R. Co.*, 148 N. Y., 347, 353–355; *Wormser* v. *Brown*, 149 N. Y., 163, 172–173.)

In this case complainants are endeavoring by injunction to prevent the enforcement of an act intended primarily to protect the consumers of this country from impure and unwholesome food. There is no allegation in the bill that the decision of the Treasury officials in the complainants' case was erroneous. The bill, by not denying, admits that the teas in question were impure and unwholesome. Asking this court to enforce the admission of these objectionable articles into the United States shows extraordinary courage.

II.

The act is constitutional.

It has not been disputed in the lower courts that Congress has the power to exclude impure and unwholesome teas, or teas of a quality which it regards as worthy of condemnation; and we submit it to be equally true that Congress can delegate to the Secretary of the Treasury the power and duty to ascertain and fix the standards of purity, quality, and wholesomeness.

(1) *Every intendment must be in favor of the validity of the statute.*

The rule was laid down as follows by Mr. Justice Peckham in the *Gettysburg Park Case* (160 U. S., 668, 680):

> In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the Government.

Among other leading cases to the same effect we may cite *Pine Grove* v. *Talcott* (19 Wall., 666, 673); *Nicol* v. *Ames* (173 U. S., 509, 514–515); *Commonwealth* v. *Blackington* (24 Pick., 353, 355).

(2) *Congress has the power to exclude any article from foreign commerce.*

The truth of this proposition was recognized by all of our early statesmen and constitutional writers, and has

never, so far as we are aware, been seriously disputed. During the first twenty-five years of our constitutional history Congress repeatedly went to the extent of prohibiting all foreign commerce whatever. When it did this by an embargo without limit of time—that is, when it passed what was in effect a permanent law abolishing all foreign commerce—the constitutional point was raised; but it was overruled by the district judge in Massachusetts (Hon. John Davis) in *United States* v. *Brigantine William* (2 Hall's L. J., 255, 28 Fed. Cas., 614). The point was not raised in any of the numerous cases under the embargo law which reached the Supreme Court of the United States, and the unlimited character of the power has since been conceded (2 Story on the Constitution, secs. 1290, 1292; 1 Kent, 431–432). Thus, for fifty years all drugs, medicines, and chemicals below a certain degree of strength have been excluded. (9 Stat., 237; Rev. Stat., sec. 2933 et seq.) The right to exclude any article from commerce with the Indian tribes, Congressional power over which is identical, is well settled. (*United States* v. *43 Gallons of Whisky*, 93 U. S., 188, 194, 195.)

Indeed, the power of Congress to levy prohibitory and protective tariff duties, when so hotly challenged during the great disputes from 1824 to 1833, was based by Madison, Clay, Grimké, Verplanck, and its other leading defenders, upon the power to regulate commerce. (See passages quoted in the brief for the plaintiff in error in the sugar-bounty case, *United States* v. *Realty Company*, October term, 1895, Nos. 869–870, at pp. 142–152.)

The powers of Congress over foreign commerce are at least as broad as those of the States over domestic production. But the latter may prohibit the manufacture of an inferior article. (*Patapsco Guano Co.* v. *North Carolina*, 171 U. S., 345.)

The power to regulate commerce with foreign nations being an enumerated power, it is entirely unlimited (when not violating any of the specific constitutional restrictions upon legislative authority). An enumerated power is "distinct and independent, to be exercised in any case whatever." (*McCulloch* v. *Maryland*, 4 Wheat., at pp. 421–422; see *Doyle* v. *Continental Insurance Co.*, 94 U. S., 535, 541.) It acknowledges no limitations other than those prescribed in the Constitution. (*Leisy* v. *Hardin*, 135 U. S., 100, 108.) It may be used for any lawful purpose. Thus, while Congress has no direct right to regulate agriculture and manufactures (*United States* v. *E. C. Knight Co.*, 156 U. S., 1), it may regulate commerce or adjust taxation for the encouragement of those industries. While it has no direct right to regulate the descent of real property in the various States, yet under the treaty-making power it can alter the laws of descent on behalf of the subjects of European nations. (*Hauenstein* v. *Lynham*, 100 U. S., 483, and cases cited; *Geofroy* v. *Riggs*, 133 U. S., 258, 266–267.)

The reasons for the exclusion of impure and unwholesome tea are obvious. The circuit court of appeals has held that the exclusion of teas of very low quality was for similar reasons—"to exclude the lowest grades of tea whether *demonstrably* inferior in purity or unfit for consumption or *presumably or possibly* so, because of their

inferior quality." (*Buttfield* v. *Bidwell*, 96 Fed. Rep., 328.) The Senate committee's report on the bill shows that Congress also excluded the very low qualities of tea for the further reason that their introduction was thought to tend in the long run to restrict the consumption of tea in the United States. (Senate Report 1527, Feb. 23, 1897.)

(3) *The statute involves no violation of due process of law.*

Appellants insist that there is a violation of their constitutional rights, because the final decision as to the admission or exclusion of the teas is confided to administrative officers "without hearing allowed the importer." But there is no provision in the statute depriving the importer of a hearing. He has the right of appeal to the Board of General Appraisers, who make the final determination "after due examination."

The Constitution does not require, however, that there should be anything like a trial at law in a case of this kind. The practice under this statute is analogous to that under the statutes for the collection of the customs revenue. Questions of fact in such matters may be decided upon inspection by the Appraisers themselves, assisted by such experts as they may choose to call in. (*Origet* v. *Hedden*, 155 U. S., 228, 236–8; *Auffmordt* v. *Hedden*, 137 U. S., 310; *Hilton* v. *Merritt*, 110 U. S., 97, 107.) Another parallel practice is that of the Treasury Department under the statutes prohibiting the admission into the country of alien immigrants who may become a public charge. It is said by this court in *Nishimura Ekiu* v. *United States* (142 U. S., 651, 663): "The statute

does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land." The constitutionality of this practice was fully considered and sustained in the case cited, the court partly basing itself upon the Hilton case, *supra*. The same practice has been sustained in the case of the anti-Chinese legislation. (*Lem Moon Sing* v. *United States*, 158 U. S., 538.)

Appellants attempt to distinguish these authorities, claiming that they are based upon some peculiarity inherent in revenue matters, and in the power to exclude aliens. No distinction is tenable. Indeed, as above shown, all of our protective duties have always been based upon the power to regulate commerce, the same power which is the basis of this statute. The power to exclude foreign goods from the country is an exercise of an express and enumerated power in the Constitution. The power to exclude alien passengers is an implied power. Otherwise the two are precisely analogous. The practice which is constitutional when directed against foreign persons arriving in the country is *a fortiori* constitutional when exercised against foreign goods.

In *Murray's Lessee* v. *Hoboken Land and Improvement Co.* (18 How., 272), the court pointed out that in considering whether a statute is consistent with due process of law it is of importance to consider the generally recognized practice in similar matters at the time of the adoption of the Constitution. Examination of the then prevailing practice as to the importation of foreign goods will show that it recognized no general right of importa-

tion at all. Indeed, no policy was more common than that of limiting such commerce from any given foreign country to one or more individuals licensed by the legislature or the Executive for that purpose (Leone Levi, History of British Commerce, 2d ed., pp. 30, 109, 235, 236; Adam Smith, Wealth of Nations, Book IV, Ch. I; New York Statute of March 15, 1781, ch. 29; 9 Hening's Virginia Statutes, 1778, p. 532). From the start Congress wisely refrained from granting similar monopolies in time of general peace, but when commerce was from time to time laid under a general embargo during the foreign wars, the right was recognized to give the President the right to issue similar licenses (2 Stat., 500, 506). The power to regulate commerce with the Indian tribes is contained in the same clause as the power to regulate foreign commerce, and is of equal scope. One of the early acts of Congress confined the right to trade with the Indians to persons holding special licenses (1 Stat., 329).

The foregoing instances confirm the proposition that the power of Congress over foreign commerce is such that nobody can be said to have an inherent right to import goods; that the importation of goods from abroad is by permission of Congress, and that it is subject to such restrictions as Congress may see fit to impose and to the supervision of such officials as Congress may see fit to provide for that purpose.

Appellants also make the novel suggestion that it is unconstitutional to provide a physical standard of comparison, since such standard can not be expressed in lan-

guage, and there is danger of deterioration in the object selected. They insist that tea is a peculiarly perishable and changeable article. This, however, is a question for Congress to decide. If it has no power to provide a physical standard of tea, it has no power to establish a physical standard of anything; and a method of commercial regulation which may appear to Congress to be the best conceivable in many cases is excluded from its jurisdiction altogether.

Such an argument would forbid the establishment by law of a standard of weight or measure, for a standard is a physical object and perishable in nature, although not to the same extent as tea. The Treasury Department at an early day had established physical standards of weight and measure. (5 Stat., 133.) Nor has the practice been confined to materials of such slight perishability as those just referred to. At least as early as 1867 the Treasury Department, under statutory direction, commenced the system of preserving standard samples of wool and hair for the purpose of comparison, precisely as under the present act. (14 Stat., 560; Rev. Stat., sec. 2916.) As early as 1864 the statutes provided for the preservation of standards "by which the color and grades of sugar are to be regulated." (13 Stat., 202; Rev. Stat., sec. 2914.) Neither of these provisions was ever attacked on constitutional grounds. Yet it is fairly presumable that no arguable objection to our tariff laws can have been so long left unraised. There has been no dearth of wool or sugar cases in this court, where the practice of the United States Treasury has been questioned by the ablest and most ingenious of counsel. Wool is indeed a less

changeable article than tea, but sugar is, if anything, more changeable. It was this sugar statute which was the subject of discussion in *Merritt* v. *Welsh* (104 U. S., 694, 702–705). The court said that the adoption of standards was "to insure certainty and uniformity," etc. The Secretary performed his duty under the act "by procuring the standards from the proper parties at Amsterdam and furnishing them to the collector."

It remains to consider whether the power to fix the *minimum* of purity, quality, and wholesomeness, below which tea should not be admitted into the United States, can be delegated by Congress to the Secretary of the Treasury.

(4) *Congress may delegate to the Executive the power to fix standards of purity and wholesomeness.*

Laying aside for the present the discussion of standards of "quality," we shall first consider the question whether Congress, having prohibited in general terms the admission of impure and unwholesome teas, can leave it to the Secretary of the Treasury to fix the exact percentage of impurity and the exact degree of unwholesomeness which will be deemed sufficient to require the enforcement of the prohibition. A slight degree of impurity occurs in many or most articles of commerce. Between wholesomeness and unwholesomeness there is a gradual gradation—a borderland of doubt which requires some authoritative definition of the dividing line.

The bill of complaint in the case at bar does not state on which ground this tea was excluded, but simply that

it was found to be "inferior in some or all of the respects designated in said act of Congress, either as to purity, quality, or fitness for consumption, to the standards so prescribed by said Secretary of the Treasury of the United States." (Record, pp. 1–2.) Since the complainants do not claim to have imported pure and wholesome tea, their bill may properly be treated as an attack on the constitutionality of the provision for establishing standards of purity and wholesomeness.

Although a statute may be unconstitutional in part, effect is to be given to it so far as may be when the valid and invalid portions of the statute were divisible. The test is whether the legislature would probably have enacted the constitutional portions had they had to stand alone. (*Allen* v. *Louisiana*, 103 U. S., 80–84; *Packet Co.* v. *Keokuk*, 95 U. S., 80–89.)

The provisions in the present statute with respect to the establishment of a standard of quality are clearly divisible from those relating to purity and fitness for consumption. They were indeed introduced by an amendment in the Senate but a few days before the passage of the bill. (Senate bill 3581, and Senate report 1527 accompanying the substitute bill 3725, Fifty-fourth Congress, second session; *Buttfield* v. *Bidwell*, 96 Fed. Rep., at p. 329.)

Comparison of the present statute with the original bill, prior to the introduction of the word "quality," shows that the words "fitness for consumption" in the prohibitory clause of the act correspond to the word "unwholesome" in the title. The questions, then, are as follows: Can Congress, having decided that teas con-

taining a substantial degree of impurity shall be excluded from the United States, delegate to the Secretary of the Treasury the duty of establishing a standard which shall be the test of substantial impurity? Can Congress, having decided that teas found to be unwholesome shall be excluded from the United States, delegate to the Secretary of the Treasury the duty of establishing a standard which shall decide, when doctors disagree, the question of unwholesomeness?

To deny this right to Congress would be to deny the right to enact effective legislation upon the subject. Experience under the act of 1883 *in pari materia* had shown that in order effectively to exclude impure and unwholesome teas "the establishment of uniform standards * * * had become a recognized necessity." (*Buttfield* v. *Bidwell*, 96 Fed. Rep., at p. 329.) These standards are not word-descriptions which can be inserted in a statute book. They are actual packages of tea, which are divided up into small lots and distributed to the custom-houses, to persons engaged in the tea trade here, and to their purchasing agents or principals in the tea-raising countries. In order to obtain a uniform and efficient administration of the law, it has been found necessary that the importer of teas and the Government examiner shall be in possession of duplicate samples of the same standard, so that the former may know precisely what instructions to give to his buyer, and that the sight, smell, and taste of the latter may have a definite test to refer to.

For tea is a commodity raised mostly in semi-civilized lands, difficult or impossible of access, by persons of strange customs, speaking an unknown tongue,

and subject to no inspection laws. The leaves are subject to adulteration by mixing with the leaves of many other plants, and in the greatest tea-producing country it is an established avocation to go around among the restaurants, collect the leaves which have once been used in the preparation of the beverage, and put up these "exhausted" leaves for export to nations of "barbarian devils" who are supposed to know no better than to use them a second time. Coloring matter is used ingeniously to touch the leaves up. In order to avoid detection of adulteration, the leaves are broken into fragments known in the trade as "dust." Impurities such as smokiness, supposed to result from improper firing, can be detected only by the senses of taste and smell; but the employment of the senses of taste and smell can not be accurately guided by any statute limits.

It has often been laid down as an axiom of constitutional law that a Federal or State legislature can not delegate legislative power. The axiom, however, is one which very seldom invalidates a statute. The line between the province of the legislature and that of the executive is difficult to determine, and, by application of the fundamental principle of constitutional law, the statute is to be given the benefit of any doubt. Carrying into effect in detail the legislative will is generally left to executive officers, although the details may be settled by the legislature if it desires to do so. There is thus a very broad field in which the legislative and executive functions are coordinate.

An extended discussion of the subject would seem to be unnecessary in view of recent decisions of this court,

which recognize that to rigidly enforce the doctrine that Congress can not delegate legislative power would often in effect be a restriction upon legislative power, and which allow to Congress very wide latitude in this respect.

The leading authority is *Field* v. *Clark* (143 U. S., 649, 680–694). That case discussed the reciprocity clause of the McKinley tariff act of 1890, which authorized and directed the President to levy certain import duties upon the products of foreign countries whose tariffs "*he may deem to be* reciprocally unequal and unreasonable." Strong attack was made upon the law on the ground that there was no standard of inequality or unreasonableness fixed, so that the President was in effect given a legislative discretion. The objection was overruled, only two justices dissenting. Among the precedents cited in the report of the case is the act of 1874 permitting the President to suspend the consular courts of Turkey and Egypt whenever he shall "receive satisfactory information" that the governments of those countries have "organized other tribunals likely to secure to citizens of the United States in their dominions the same impartial justice which they now enjoy there," etc.

The McKinley reciprocity clause is very similar in construction to the present act. Congress indicated a desire to retaliate against all foreign tariffs which are "reciprocally unequal and unreasonable," but gave no indication as to what its standard of inequality and unreasonableness would be. On the contrary, it most expressly left the determination of this matter to the President and intrusted to him the sole responsibility of putting the law into effect, leaving his discretion entirely

untrammeled. So in the present statute, Congress having indicated that it desires tea imported in the future to be substantially pure, good in quality, and fit for consumption, turns the matter over to the Secretary of the Treasury and the assistants whom he is authorized to call together, knowing them to be much better qualified than itself to fix standards for the carrying into effect of the legislative will.

Tremendous legislative powers were delegated to President Washington by some of our earliest legislation. Thus by the act of June 4, 1794, chap. 41 (1 Stat., 372), he was, "*whenever in his opinion the public safety shall so require*, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require, and to continue or revoke the same *whenever he shall think proper;*" the embargo to terminate in fifteen days from the next actual meeting of Congress. No standard was given him to which to refer. Similar wide powers were four times granted to Presidents Adams and Jefferson (1 Stat., 615; 2 Stat., 9–10, 352, 411). The tonnage act of March 3, 1815 (3 Stat., 224), repeals discriminating duties as to any foreign nation whenever the President "*shall be satisfied* that the discriminating or countervailing duties of such foreign nation, *so far as they operate to the disadvantage of the United States*, have been abolished." Here again no standard was given him. He was merely to exercise the act—legislative in essence—of deciding whether a certain condition of things was generally disadvantageous to the

United States. More radical powers, with a discretion at least equally wide, were granted by the Canadian reciprocity act of March 3, 1887 (24 Stat., 475). Equally wide discretion is given by the food acts (Rev. Stat., sec. 2494; act of August 30, 1890; 26 Stat., 414).

These and similar enactments are set forth in the opinion of the majority in *Field* v. *Clark, supra.* We proceed to the enumeration of some which were not there mentioned.

In *Dunlap* v. *United States* (173 U. S., 65), the tariff act of 1894, as construed by this court, provided for a rebate of the alcohol tax to manufacturers in case the Secretary of the Treasury should find that such rebate was practicable and make regulations accordingly. The Chief Justice said, in delivering the opinion of the court (p. 71): "But if the right of the manufacturer could not enure without regulations, and Congress had left it to the Secretary to determine whether any which he could prescribe and enforce would adequately protect the revenue and the manufacturers, and he had concluded to the contrary, or if he had found that it was not practicable to enforce such as he believed necessary without further legislation, then it is obvious the right to the rebate would not attach." The constitutionality of this legislation was strenuously attacked by the able counsel who appeared for the manufacturers, but the majority of the court held that Congress "may reasonably be held to have left it to the Secretary to determine whether or not such regulations could be framed, *and if so, whether further legislation would be required.* It is true that the right to the rebate

was derived from the statute, but it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations if he found it practicable to do so." (p. 74.)

It has been held in lower courts that the discretion lodged in the Secretary of War as to allowing bridges over navigable rivers is an unconstitutional delegation of power, but the latest decision is to the contrary. (*United States* v. *City of Moline*, 82 Fed. Rep., 592.) The Secretary of War has a general right to make rules for the regulation of navigation on navigable rivers, which have the force of law; and both he and the Secretary of the Navy have large legislative powers over their respective departments of the public defense. (*United States* v. *Ormsbee*, 74 Fed. Rep., 207, 209, and cas. cit.)

The number of instances to be found in our laws where a wide discretion is left to an executive officer is necessarily very great. We may refer, for instance, to the provisions of the civil-service act requiring that standards of fitness for office be established, but leaving it to the President to fix the standards. The constitutionality of such provisions has always been upheld. (Opinion of Justices, 138 Mass., 601.)

No complaint seems ever to have been made of the act of June 26, 1848, chapter 70, "to prevent the importation of adulterated and spurious drugs and medicines" (9 Stat., 237; Rev. Stats., sec. 2933 *et seq.*), because it delegates power to determine the standards of "quality, purity, and fitness for medical purposes." That act was the prototype of the act now under discussion. The standards are not even fixed by an executive officer of

this Government, but by "the United States, Edinburgh, London, French, and German pharmacopœias and dispensatories." (Sec. 2935.) The Treasury regulations are similar to those under the tea act. Thus among the articles admitted are "aloes when affording 80 per cent of pure aloetic extractive." Under "opium" is a provision that "the percentage of morphia contained in imported crude opium must be ascertained by what is known as Dr. Squibb's method of analysis." Under "rhubarb" is the following: "None admissible but the article known as East Indian, Turkey, or Russian rhubarb." (Customs Regulations, 1892, pp. 370–372.)

A recent example of the delegation of power to fix a standard for use in regulating foreign commerce is to be found in the provision for the free admission to this country of animals of "recognized breeds," the recognizing power being the Secretary of Agriculture. (Tariff of 1897, paragraph 473.)

By the Alaska act of July 27, 1868, c. 273 (15 Stat., 240, 241, 246; Rev. Stat., secs. 1955, 1956), the importation and use of firearms was made subject to the discretion of the President, while the power to make game laws as to fur-bearing animals was delegated to the Secretary of the Treasury.

The Secretary of the Treasury is also made the sole judge of the expediency of increasing the subsidiary copper coinage. (Act of February 12, 1873, c. 131, sec. 30; 17 Stat., 429; Rev. Stat., sec. 3529.)

Congress can authorize the Secretary of the Treasury or Secretary of the Interior to require, in their discretion,

oaths the violation of which is ground for prosecution for perjury. (*United States* v. *Bailey*, 9 Pet., 238; *Caha* v. *United States*, 152 U. S., 211, 219.)

It can delegate to the Postmaster-General the power to determine what constitutes a lottery, and exclude its circulars from the mails. (*Enterprise Savings Asso.* v. *Zumstein*, 37 U. S. App., 71.)

These are but instances selected from an immense variety to be found in the Federal statute books to the same effect.

Similar instances may be found everywhere among the statute books of the various States and decisions thereunder.

Thus we may refer to the discretion given to the courts as to the admission of attorneys, which is not confined to the case of attorneys who are to exercise the privilege of appearing in court. So the establishment of a standard of fitness for admission to medical practice may be fixed by a State medical society or university. (*Hewitt* v. *Charier*, 16 Pick., 353.)

In *State* v. *Heinemann* (80 Wis., 253, 257, 258) a number of statutes are referred to, which have received the approval of the courts, which grant to State boards the right to examine and license candidates for entrance into certain occupations, such as medicine, dentistry, pharmacy, plumbing, and locomotive engineering. The standards of quality are fixed by these boards.

In *Dent* v. *West Virginia* (129 U. S., 114, 122) Mr. Justice Field refers to the common legislative practice "to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely,

their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal." In the case cited one of the qualifications for the practice of medicine was a diploma from "a reputable medical college in the school of medicine to which the person desiring to practice belongs." The State legislature thus delegated the fixing of standards to non-official bodies whom it considered more competent in that particular than itself.

In *Martin* v. *Witherspoon* (125 Mass., 175) it was held proper to authorize the governor and council "to prescribe under what circumstances outgoing vessels shall be compelled to take pilots."

In re Flaherty (105 Cal., 558), quoted by this court with approval in *Wilson* v. *Eureka City* (173 U. S., 32, 36–37), an ordinance giving a single municipal officer absolute discretion to permit or forbid the beating of drums on the street was sustained; and the courts cite a large number of similar decisions. This court in the latter case cites also an ordinance allowing the mayor of Boston to decide whether anyone shall be allowed to address the public in public grounds.

This license system, so common in our municipalities, is a yet more advanced instance of the delegation of discretion to the executive officers; for they are not required to establish standards at all, but may limit the number of licenses to be issued and select the licenses according to

their own discretion. At a time when all foreign commerce was interdicted by embargo, and the coasting trade was put under heavy restrictions, a licensing power was given to the President, to be exercised according to his discretion. (Embargo acts of 1808–9, 2 Stat., 500, 506.)

Of similar character, as pointed out by Judge Cooley, was the power given to the President during the civil war to suspend the writ of *habeas corpus*. (Cooley's Constitutional Law, 2d ed., pp. 100–101.)

The decisions of the various State courts (there are no such decisions of this court) holding statutes to be void as involving a delegation of legislative power are based upon a rigid theory as to the division of power between the three coordinate branches of the Government, which theory has been found so impracticable that it has been very much relaxed by the general weight of authority. Many interesting instances might be quoted where these spheres have been held to overlap.

Thus the pardoning power is granted by the Constitution to the President; but the remission of penalties, which is a branch of the pardoning power, was assumed from the time of the First Congress to be within legislative jurisdiction (6 Stat., 3), and was then delegated by Congress to the Secretary of the Treasury. (*The Laura*, 114 U. S., 411, and statutes cited.)

The recent case of *United States* v. *Duell* (172 U. S., 576) sustains a direct appeal from the Commissioner of Patents to the court of appeals for the District of Columbia, thus affording a most striking illustration of the principle that the same act may be both executive and judicial in character; and other instances to the same effect

are collected in the article on "Federal Judges and Quasi Judges" in 6 Yale L. J.

In *City of Wahoo* v. *Dickinson* (23 Nebr., 426) and *City of Burlington* v. *Leebrick* (35 Iowa, 252), it was held that the legislature could authorize the courts to decide whether certain territory would receive material benefit from annexation to a city, or whether justice and equity required such annexation, and if so to annex it by judicial decree, thus delegating a legislative question to the judiciary.

Rules of court sometimes revolutionize the settled methods of procedure in litigation. Such rules are legislative in character, the right to legislate in this manner being delegated to the courts.

We have thus far argued this question of delegation of power as if it was really a broad constitutional principle, such as is claimed by the appellants, debarring the legislature from delegating any portion of its legislative discretion to an executive officer, even though the legislature should be of the opinion that the object which it desires to attain would be better effectuated by such delegation. It may be considered bold for us to contest this doctrine after it has been so often laid down by courts of authority, and even conceded in several opinions of this court. The doctrine never has, however, been made the basis in this court of a decision invalidating any particular statute. Every recognition which it has received in this court has been *obiter*.

It must of couse be conceded that the legislature can not delegate distinctively legislative functions to the

Executive or to the judiciary without the consent of the latter. No department can be made to do the duties of another department except by its own consent.

It may be safe to concede also, that a statute can be conceived of—although perhaps none has ever been actually enacted—which would be uncontestably void as a delegation of legislative power. Thus, if we assume that at the end of the second year of a presidental term one of the political parties is in possession of the three branches of the legislature (President, Senate, and House), and that the Senate and the House are about to pass into the control of the opposite party by less than a two-thirds majority, it may be conceived that a law might be enacted delegating the entire legislative power to the President for the remainder of his term; and such a statute may be conceded to be unconstitutional.

But we have already shown the doctrine to be full of exceptions, and we believe that the analogy of these exceptions, properly applied, would sustain every statute *which evinces upon its face a legislative belief that some executive or judicial officer is better fitted than Congress to prescribe the course of action necessary to effectuate some particular result which Congress desires*—that no such statute can fail of operation unless the executive or judicial officer upon whom the burden is cast declines to bear it.

If we search for the origin of this doctrine, we shall find it in a time when the doctrines of Montesquieu concerning the radical separation of the legislative, executive, and judicial functions were far more unreservedly

confided in than at present. The decisions and statutes to which we have referred have largely broken down the sharp lines which had been supposed to exist, and shown that to a very large extent the three spheres overlap.

Few constitutional writers have made any reference to this doctrine. The only writer of prominence who considered it at any length is Cooley; and nothing could show its shadowiness more tellingly than the way in which he treats it. In the latest edition of his shorter work (Cooley's Constitutional Law, 2d ed., p. 100) he refers to four authorities besides his own former treatise. One of these is Locke's Treatise on Civil Government. Another is the purely obiter treatment by this court *In Re Rahrer* (140 U. S., 545). Another is *Barto* v. *Himrod* (8 N. Y., 483), which decided that the power to make a statute actually binding as law can not be delegated by the legisture to the people of the State. The fourth authority is *Rice* v. *Foster* (4 Harrington, 479), which held local-option laws to be unconstitutional. Now the last of these cases is universally or almost universally regarded as overruled, while the Barto Case has been often disapproved. (*Fell* v. *State*, 42 Md., 71, and cases cited.) Judge Cooley himself evidently experienced a considerable change of mind on this subject after his first discussion of it. Thus the text of his main work approves the rule in the Barto case (Cooley's Constitutional Limitations, 6th ed., p. 142); but the notes to the later editions of that work concede the "great force" of the remarks of Redfield, C. J., to the contrary in *State* v. *Parker* (26 Vt., 357); and finally come to the point of pronouncing that the position taken

by Dixon, C. J., to the contrary in *Smith* v. *Janesville* (26 Wis., 291), "though opposed to many others, appears to us entirely sound and reasonable" (id., pp. 143, 144, notes).

The decisions which were the original supports of this doctrine have thus been knocked from under it. We respectfully submit that the arguments by which their authority has been demolished, and the arguments of this court in the Field and Dunlap cases, which have made such great rents in this antiquated doctrine, will, if carried to their necessary conclusion, overrule every case in which the doctrine has been applied up to the present time; in other words, that, as applied to any form of legislation familiar to past experience, the doctrine has no practical existence at the present time.

(5) It is thus clear that the Secretary of the Treasury may receive a power to fix standards of purity and fitness for consumption. Were it necessary for the purposes of this case, we might proceed further and show that he may also fix standards of quality. The same line of argument would apply.

As the circuit court of appeals perceived in the Buttfield case above cited, the difficulty in detecting impurities is so great, and the presence of impurities is so much more common in the lower grades, that Congress could not fully effectuate its intent without requiring a test of quality also. This test likewise Congress itself could not practicably formulate, and its formulation was necessarily left to executive officers. Under the present bill of complaint it is unnecessary to prolong this already extended brief by further elaboration.

III.

In closing, a few words may be said about the public policy of this statute, and its actual effect as shown by experience.

The evils previously existing, and which the act of 1883 had failed to remedy, are to some extent set forth in the Senate report of February 23, 1897, above referred to. A great mass of very low-grade tea, or merchandise imported as tea, had come upon the American market and was being sold, although it was of a quality regarded in the trade as worthless. Its effect was believed by a great majority of the trade (and, on their representations, by Congress) to be a fraud upon the consumer, who would not make a second purchase; so that it tended to drive tea out of consumption altogether in the districts where these low-grade goods had been most successfully worked off. Certain reckless importers, while making great profits for themselves and disorganizing the whole trade, were thus not only giving opportunity for fraud by middlemen upon the consumer, but were inflicting injury in the long run upon the trade itself—an injury which would under the present conditions be shared by the United States Treasury, by diminishing the return from the revenue duty now collected from importers of tea. A great majority, as we are informed, of the persons constituting the tea trade of the United States—importers, jobbers, and retailers alike—have been led by their experience of the practical workings of this act to give it their entire approval. No complaint has been heard from the consumers. The

price to them has been raised little, if at all, while for the first time the tea consumed in the United States is now everywhere good. This great advance in our material comfort is the direct result of the act of 1897.

As above stated, the Secretary of the Treasury, aided by the boards of tea experts of 1897, 1898, and 1899, has used his best endeavors to fix standards so low that the cheapest teas which are pure and genuine, unaffected by foreign flavors, and possessing the flavor of tea in substantial strength, can come freely into the United States. Cheaper grades are regarded as doubtful in purity, even though impurity can not affirmatively be shown. At the very start it was endeavored to establish a standard for each producing district. (*Syn. Dec.* 17995, Apr. 21, 1897.) When the Sang Lung case above cited, and the complaints out of which it arose, showed that one district had been overlooked, it was immediately added by a supplemental order of the Secretary. (*Syn. Dec.* 18554, Nov. 6, 1897.) Since the flavor is necessarily used as a test of fitness for consumption, it was also expressly ordered that it should be used only as an index for that purpose and not "limited to the particular characteristics of the tea district from which the standard comes." (Id.) By a subsequent circular it was directed "that the flavor may be that of a different district so long as it is equal in sweetness" (*Syn. Dec.* 18933, Feb. 7, 1898), the word "sweetness" being a trade term for the genuine tea flavor as distinguished from the smoky, sour, etc., flavors which sometimes affect it and are by some believed to be due to impurities.

It is urged (although this is a matter for the legislature rather than the court) that there is a possible hardship in the law, from the fact (as claimed by appellants) that the Secretary "can change the law governing any particular tea at any time by changing the standard," so that "the character of tea lawful to be imported when shipped may be in the meantime illegal when it arrives," thus enabling the Secretary "to control the supply and demand from time to time; to enact, alter, modify, and repeal from time to time, in his unlimited discretion, the rule which regulates commerce in teas." This is based upon a misapprehension. As in the case of many other commodities, there is a regular season for the purchase and importation of teas. The crop is an annual one, and each crop is purchased and imported (commencing in the late spring) long before any purchase is made from the crop of the following year. The statute is drawn with reference to this state of facts. The board of tea experts which prepares the standard samples of tea is appointed before February 15 of each year. This enables the standard samples to be prepared, examined, and passed upon by the Secretary of the Treasury in time to permit their shipment to the ports in the tea-producing countries before the commencement of the purchasing season. It is not a correct construction of the statute, if we read its wording and intent correctly (and it must be so construed as to be reasonable), that the Secretary of the Treasury has any power to raise or lower the standard during the season for which it is established. There is no provision for an alteration of standards once

established, nor could the intent of the act be effectuated if the standards supplied by the Secretary of the Treasury to importers and dealers for shipment abroad be different from the standards afterwards actually used in the examination of the teas which have been purchased in reliance thereon.

There is some liability to the commitment of error in the administration of a law by comparison of imported teas with the standards, but no more than in the administration of other laws and not sufficient to impair substantially the general satisfaction over the administration of this one.

It is claimed by some, although denied by others, that there is a difference in the grade of teas admitted to the country at different ports, owing to the personal equations of different examiners. There may be something in this respect calling upon the departmental appellate tribunal or Secretary of the Treasury for action; but such defects in practice under the law, if they exist, do not render the law itself invalid.

Some stress has been laid by the opponents of the law upon the argument that the powers given to the Secretary of the Treasury are subject to abuse. It would be impossible to administer the Government if powers susceptible to abuse were withheld from executive officers. While this power is susceptible of abuse, the probability of abuse is particularly small. Even were the seven tea experts, selected from all parts of the United States, to band together for any such purpose, their action would fail to receive the force of law did it not receive the approval of

the Secretary. The Secretary would hear the objections made, and if he found them well taken he could refuse to approve a recommendation to the board until the standards were reduced so as to admit the good but cheap grades of tea which are called for by the people. Tea is a commodity of almost universal consumption, especially among the poor. No Secretary of the Treasury and no board of tea experts will ever permit it to be set apart as a mere luxury for the rich.

For the above reasons it is respectfully submitted that the decree of the circuit court should be affirmed.

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No. 232.

Reply Brf. of Atty. Gen.l of Petitioners

for Cert.

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In the Supreme Court of the United States.

OCTOBER TERM, 1890.

WILLIAM J. CRUICKSHANK ET AL.
v.
GEORGE R. BIDWELL. } No. 232.

REMARKS ON THE BRIEF SUBMITTED ON BEHALF OF WILLIAM J. SUTTFIELD ET AL.

In the Supreme Court of the United States.

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v.) No. 232.
GEORGE R. BIDWELL.)

REMARKS ON THE BRIEF SUBMITTED ON BEHALF OF WILLIAM J. BUTTFIELD ET AL.

Mr. Butterfield and his allies have attempted by a suit in the circuit court to obtain a definition of the word "quality" in the tea act of 1897. They are not satisfied with the definition given them by the circuit court of appeals (*Butterfield* v. *Bidwell*, 96 Fed. Rep., 328). The decision with which they are dissatisfied is not appealable, having been made upon an appeal from an interlocutory order. The case is, however, now pending in the circuit court upon demurrer to this bill of complaint, and may be brought here in due course for final determination.

Their present brief seems to be an attempt to obtain a preference of the case by a short cut, so as to save a year or so of delay. It seems to be an attempt to obtain *obiter dicta* for use at the Treasury Department.

It is not necessary for the purposes of this case to answer the various questions which have been mooted before the Treasury officials concerning scope of the word "quality" in the statute.

In the first place, the bill of complaint is so drawn as to raise only the question of constitutionality, and only the question whether the statute as a whole is unconstitutional. Appellant did not allege, as he was bound to do if any specific question as to "quality" were to be decided, that his goods were rejected for deficiency in that particular.

In the second place, the definition of the word "quality" affects only the construction of the act, not its constitutionality. It is conceded by all parties that Congress has the power to exclude any or all teas from our ports, and, in particular, that it has the power to exclude teas of quality so low as to be in its opinion unfit for use. Having the right to exclude teas, it may impose such conditions as it may think proper upon their admission. Examination of this statute—construing it, as is proper, in the light thrown upon it by the committee report upon which it was adopted by Congress—shows that Congress intended simply to exclude all teas which for any reason whatever are unfit for use, leaving the question of fact to be decided by the customs officers, guided by standards fixed by the Secretary of the Treasury and a body of experts. The only objection urged by Mr. Buttfield's counsel seems to be that Congress did not describe the degree of unfitness for use in definite language. But the degree of definiteness called for by this objection is entirely unnecessary under the cases of which *Field* v. *Clark* (143

U. S., 649) is the leading example. The statute discussed in that case authorized the President to impose duties upon the products of nations whose tariffs "in view of the free introduction of" certain articles "into the United States, he may deem to be reciprocally unequal and unreasonable." Two Presidents might differ most radically in their views of reciprocal equality and reasonableness, yet no test was provided by Congress whereby the courts could decide which was right in any given case. Whatever may be the scope of the word "quality" in this statute, the ascertainment of the degree of quality necessary to constitute fitness for use involves no greater range of discretion than the ascertainment of the degree of reciprocal inequality and unreasonableness of foreign tariffs.

The bill of complaint in the case now regularly before this court does not call for a construction of the word "quality," and I have not prepared myself to argue that point at the present time; nor have I regarded it as my duty to do so; but I submit for the assistance of the court, if it desires to examine into the arguments of Mr. Buttfield, the following extracts from the brief of the appellees at the circuit court of appeals in Mr. Buttfield's case:

(*a*) "The complainant concedes that if the word "quality" be given its natural meaning, it is fully as broad as we contend. His leading affiant, Mr. Lester, states its technical meaning in the tea trade to be as follows:

> Quality, as determined by the customs and usages of the tea trade, includes all the attributes of tea which affect the tea's market value, including style or appearance of dry leaf, size or brokenness of leaf,

flavor, strength, and body of cup or drinking quality of leaf itself, which depends on its youngness, soil in which it is grown, climatic influence, and season of the year in which it is picked, etc.

The term quality is a very familiar one in the English language. It is not synonymous with wholesomeness. It does not represent hygienic qualities. It represents the attributes of an article in their widest scope. No broader jurisdiction could be given over any article than by giving power to regulate its quality.

Webster gives the definition as follows: "The condition of being of such and such a sort as distinguished from others; nature or character relatively considered, as of goods; character; sort; rank."

Worcester says: "The nature of a thing relatively considered; property of a thing; attribute."

The Century's corresponding definition is: "Degree of excellence or fineness; grade, as the food was of inferior quality; the finest quality of clothing."

There are many other derivative definitions in the dictionaries, but these are the definitions most closely applicable to the present case.

It being thus conceded that both the trade definition and the dictionary definitions of the word are broad enough to cover the meaning which the Treasury Department attaches to it, it follows that there is no ambiguity in the statute.

(*b*) Since, then, there is no ambiguity in the statute, and since it does not offend the moral sense or involve any injustice, oppression, or absurdity, it must be inter-

preted in accordance with its plain meaning, which can not be changed by any judicial rules of construction.

(*c*) Complainant argues that the word "quality" should be construed as if it read "wholesomeness." But an article without wholesomeness is an article without fitness for consumption. Hence the word "quality" would be given no meaning in the act if complainant's construction were adopted, and this would violate one of the cardinal rules of construction, stated in *Market Co.* v. *Hoffman* (101 U. S., 112, 115–6):

> It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, section 2, it was said that "a statute ought, upon the whole, to be so construed that if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times.

The application of this rule is especially striking when it is borne in mind that the statute as originally drawn contained only the words "purity and fitness for consumption," and that the word "quality" was subsequently inserted by amendment.

(*d*) That the word "quality" should be given its ordinary trade meaning and that it was intended to have especial reference to the test by the taste of the infusion, is shown by the context. Section 7 of the statute ends with the following words:

> The purity, quality and fitness for consumption of the same shall be tested according to the usages

> and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

Describing the three tests by infusion in boiling water, Mr. Phelan, chairman of the Board of Tea Experts of 1897 and 1898, says:

> The second of these tests is by the smell and taste of the liquid, which indicates the degree of strength of the article as well as the character of its flavor. This second test has during said period been generally known throughout the United States by the trade designation of the test for "cup quality" or "quality."

This statement is confirmed by Examiner McGay and by other experts of recognized standing, and is not disputed, although Mr. Phelan's general definition of "quality," is insisted by complainant and his expert to be *too narrow*.

[Mr. Phelan's definition is as follows: "The word quality has been for thirty years a general trade designation throughout the United States denoting the strength and character of the flavor of the tea. It is ascertained by the second of the tests aforesaid."]

(*c*) The statute is not a penal one, within the meaning of the rule of construction appealed to by complainant. The statute is remedial, and to be construed as such, notwithstanding that the tea must be destroyed to get rid of it, if the importer refuses to send it away within six months after its rejection. (See *United States* v. *Stowell*, 133 U. S., 1 and cas. cit.).

(*f*) The word "uniform" in the statute has no bearing on the question. It is not repugnant to the existence of a separate standard for each general class of teas, any more than constitutional provisions for uniformity of taxes are repugnant to the existence of separate taxes on separate subjects of taxation. Even were wholesomeness the sole object sought by this statute, the standard for green tea would have to differ from the standard for black.

(*g*) The main grievance of this complaint is that the Government interprets the statute as requiring a substantial degree of strength in teas imported. But in the drugs act, which has been in operation since 1848, the word "quality" involves a requirement of substantial strength (Rev. Stat., secs. 2933, 2935–6); and the legislative power to make such a requirement is well settled. (*Patapsco Guano Co.* v. *North Carolina*, 171 U. S., 345.)

There is nothing in this act to indicate that Congress meant anything less by the term "quality" than its meaning in the old and familiar statute just cited.

The other thing of which he complains with relation to the interpretation of the word "quality" is the requirement that foreign flavors, not belonging to tea, such as smoky and sour flavors, shall exclude the importation. This is really a safeguard of purity; for as it is often impossible here to prove affirmatively that foreign flavors are due to impurities, a general requirement of this kind is the only way in which impurities can be effectually shut out.

(*h*) The fact that the title of the statute is narrower in scope than the statute itself is immaterial. The title may

be used in construing a statute when the body of the statute is ambiguous; but the ambiguity must be found in the word to be construed or in its context and not in the title. One of the latest expressions of this familiar rule is in *United States* v. *Oregon and California R. R. Co.* (164 U. S., 526, 541):

> The title is no part of an act and can not enlarge or confer powers or control the words of the act, unless they are doubtful or ambiguous. * * * The ambiguity must be in the context and not in the title to render the latter of any avail.

In *Hadden* v. *The Collector* (5 Wall., 107, 110) Mr. Justice Field said:

> At the present day the title constitutes a part of the act, but it is still considered as only a formal part. It can not be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature.
>
> These observations apply with special force to acts of Congress. Every one who has had occasion to examine them has found the most incongruous provisions, having no reference to the matter specified in the title (citing instances).

It is quite common for the title of a statute to be narrower than the statute itself, and the reason often is (as we shall show to be the fact in the present case) that the

original bill while in its progress through Congress is broadened by amendment without a corresponding amendment to the title.

Perhaps the most familiar instances in the Federal courts are in the subtitles or headings of the tariff acts, which are so often absurdly insufficient to cover the articles therein enumerated. Thus, sponges used to appear under the heading of "Chemicals, oils, or paints," and cork under "Flax, hemp, and jute." (21 Atty. Gen. Opin., 67; *Hollender* v. *Magone*, 149 U. S., 586, 591; *Seeberger* v. *Schlesinger*, 152 U. S., 581, 583.)

(*i*) That the word quality is to be given a broad significance, whether the ordinary dictionary definition or the usages of the trade be our authority for its meaning, is clearly shown by the history of the act. It is well settled that in construing an act not only is prior legislation *in pari materia* to be considered, but also it is important to examine the original form of the bill and the way in which the amendments thereto were inserted, for which purpose the Journals of Congress may be considered. (*Blake* v. *National Banks*, 23 Wall., 307; *Legal Tender Cases*, 12 Wall., at p. 559; *United States* v. *Burr*, 159 U. S., at p. 85.)

The former act *in pari materia* was the act of March 2, 1883, chapter 64 (22 Stat., 451), entitled "An act to prevent the importation of adulterated and spurious teas." The first section of this act prohibited the importation of "any merchandise for sale as tea adulterated with spurious leaf or with exhausted leaves, or which contain so great an admixture of chemicals or other deleterious substances as to make it unfit for use." The act pro-

vided for an examination of the merchandise "with reference to its purity and fitness for consumption" (sec. 2). "Exhausted leaves" were defined to "mean and include any tea which had been deprived of its proper quality, strength, or virtue by steeping, infusion, decoction, or other means" (sec. 6). It will be noticed that the act treated the specific things prohibited under the first section as including whatever was inconsistent with the purity and fitness for consumption of the tea.

In practice the phrase "deleterious substances" came to have a very broad signification, including not only substances other than tea, but also tea leaves which had suffered by careless picking or bad curing; and customs officers were, as early as 1889, many years before the passage of the present act, cautioned to secure a strict examination of teas of this character. Assistant Secretary Tichenor directed the collector of this port on July 30, 1889 (Syn. Dec., 9534), as follows:

> The statements of the consul and the documents inclosed in his communication indicate that it is a well-recognized fact among dealers in China that Amoy oolongs are generally dirty, adulterated, carelessly picked, or poorly cured, and their reputation is so vile that all markets save that of the United States are now closed to them.
>
> A circular letter issued by Messrs. Russel & Co., of Amoy, speaks of these teas as the decayed vegetable matter of China, and states that it is difficult to understand how, under the existing inspection regutions, they can be dealt in.
>
> * * * * *

> Your attention is called to this matter in order that a strict scrutiny may be made at your port of all importations of this grade of teas, with a view to prevent the admission of teas which may be found to be in violation of the act prohibiting the importation of adulterated and spurious teas.

The act of 1883 contained no provision for the establishment of Government standards, and its administration was far from uniform, both on this account and because the act left so wide a discretion in the examiner as to what is "deleterious," for there is a very great difference of opinion as to the hygienic character of these low-grade teas, such as described in the Treasury circular above quoted.

The act of 1897 as originally introduced was drafted for the double purpose of establishing definite standards in the interest of uniformity and broadening the statute by omitting all phrases which might restrict the meaning of the term "fitness for consumption." The bill was introduced January 22, 1897, by Senator Hill, and bears the number 3581. It is entitled "A bill to prevent the importation of impure and unwholesome tea." It strikes out the words above quoted from the first section of the act of 1883 and substitutes therefor the words "any merchandise as tea which is inferior in purity or fitness for consumption to the standards provided in section 3 of this act." Section 3 provided for the adoption of standards and deposit of samples, the standards so fixed "to be the standards for purity and fitness for consumption of teas permitted or sold within the United States." The

Secretary of the Treasury, through his power of confirming the recommendations of the board of tea experts, was thus made the arbiter of fitness for consumption as well as of purity; "fitness for consumption" was treated as equivalent to "wholesomeness;" and the word "unwholesome" was doubtless regarded as including everything which under the prior act had been considered "deleterious."

The bill was referred to the Committee on Commerce and amended by the committee in various respects. The only amendment important to the case at bar was the insertion of the word "quality" after the word "purity" at every one of the many points where the latter word occurred in the act. Doubtless the committee (whose report was confirmed by both houses of Congress) intended to add something to what was in the bill before—to enlarge the scope of the prohibitions of the act. The word was evidently carefully chosen. It can not have been chosen as a synonym for wholesomeness, because, first, it would have been simpler, more natural, and more effective to say simply "wholesomeness," and, second, because wholesomeness was already guaranteed by the phrase, "fitness for consumption."

(*j*) While we are not permitted to examine the debates of Congress, it is proper to examine the reports of Congressional committees, upon which reports the action of Congress was based (*The Delaware*, 161 U. S., 459, 472).

The Committee on Commerce of the Senate, in submitting the substitute bill which actually passed (Senate bill 3725), and which introduced the word "quality" at

so many points in the bill, presented a report drawn by Senator White of California (Senate Report 1527, Fifty-fourth Congress, second session, February 23, 1897). The report stated that the committee had taken evidence on the subject and had submitted the original bill to the Secretary of the Treasury, who reported a substitute practically identical to the one now presented.

The report shows clearly that while the unwholesomeness of the teas to be excluded was borne in mind as an important element, the effect of the law was intended to be still more sweeping, and to shut out the lowest grades of tea altogether as "unfit for use." Among the consequences of the law of 1883, the committee reported that "millions of pounds of tea unfit for use are being constantly admitted," while our people "are now drinking the lowest average grade of tea ever before known, *while many consumers are giving it up altogether.*" The remedy proposed is the establishment of standards of the "lowest grade of tea fit for use." The effect of the amendment, in addition to the securing of uniformity by the establishment of standards, is stated as follows:

> (4) The tea trade of the United States will be benefited by having trash, *which is ruining the business*, and which has for many years constituted the principal part of the surplus supply, effectually excluded.
>
> (5) The consumers of the United States will be protected as never before *from the imposition upon them of worthless rubbish*, and be sure of receiving an article fit for use.

The word "worthless" is evidently not used as the equivalent of "without present pecuniary value." No legislation against the latter defect is necessary. It is used as the equivalent of the prior phrase, "unfit for use." What is the test of unfitness? Plainly something broader than mere unwholesomeness. The quotations we have given show the test to be a two-sided one. Consumers were to be protected from being imposed upon with an article so low in grade that it can not hold a permanent place as an article of consumption; and on the other hand the trade were to be protected from the introduction of an article for sale under the name of tea which has the effect of reducing the consumption of tea in the United States.

Respectfully submitted.

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